

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SYLVESTER JAMES MAHONE,

Plaintiff,

v.

PAT MCCARTHY, PAUL PASTOR,
EDDIE PARKER, BALDEROMA,
MARVIN SPENCER, MARTHA KARR,
DANIELS, KATHY MILLER, CARN,

Defendants.

CASE NO. C14-5812 BHS-JRC

REPORT AND RECOMMENDATION
AND ORDER OF STAY

NOTED FOR:
APRIL 24, 2015

The District Court has referred this 42 U.S.C. § 1983 civil rights action to United States Magistrate Judge J. Richard Creatura pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), and local Magistrate Judge Rules MJR1, MJR3 and MJR4.

Currently before the Court is plaintiff's motion for default judgment (Dkt. 28). This was brought about because of defendants' failure to comply with this Court's previous order to file within sixty days an answer or a motion as permitted under Fed. R. Civ. P. 12 (Dkt. 5, p. 2.). Also before the Court is defendants' untimely motion to dismiss for failure to state a claim, which was filed after the Court's deadline (Dkt. 27). Although the Court recommends that

1 plaintiff's motion for default judgment be denied, there should be some consequence for
2 defendants' failure to comply with the Court's previous order.

3 Therefore, although the Court recommends denying plaintiff's motion for default, the
4 Court will issue a separate order to show cause directing defendants and their counsel to show
5 cause why sanctions should not be imposed for the delay and additional work caused by the
6 failure to file a timely answer or dispositive pleading. The Court will delay consideration of
7 defendant's motion to dismiss until the issue of sanctions has been addressed. The Court orders
8 that this action be stayed pending the Court's decision on sanctions.

9 PROCEDURAL HISTORY

10 On October 29, 2014, the Court entered an order directing service of the complaint (Dkt.
11 5). In that Order, the Court told defendants that if they accepted service by mail they would have
12 60 days to file an answer or a motion as permitted under Fed. R. Civ. P. 12 (Dkt. 5, p. 2.).
13 Defendants waived service and entered notices of appearance (Dkt. 7 to 17). Defendants also
14 filed a motion asking for additional time to respond to discovery (Dkt. 19). But defendants did
15 not file either an answer or a timely dispositive motion by December 29, 2015, as ordered by the
16 Court. Therefore, defendants were in default as of that date.

17 On January 16, 2015, after the Court's deadline had passed, defendants filed a response
18 to a motion to appoint counsel (Dkt. 22), but still failed to file an answer or dispositive motion.
19 On January 29, 2015, the Court entered an Order to Show Cause directing plaintiff to prosecute
20 his action (Dkt. 26). In that order, the Court noted that the time for defendants' filing of an
21 answer or dispositive motions had elapsed (Dkt. 26). The next day, defendants filed an untimely
22 motion to dismiss (Dkt. 27). Ten days later, on February 10, 2015, plaintiff filed a motion asking
23 the Court to enter default judgment (Dkt. 28).

Defendants re-noted their motion to dismiss for March 13, 2017 (Dkt. 29 to 31). The parties then filed responses to motions and replies.

DISCUSSION

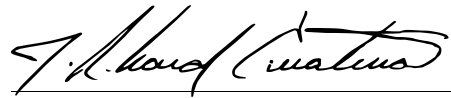
A. Plaintiff's motion for default.

Fed. R. Civ. P. 55 gives plaintiff the ability to move for default judgment if a defendant fails to plead or otherwise defend in a civil action. *See* Fed. R. Civ. P. 55. "Entry of default judgment is not a matter of right." *SuperMedia LLC v. Law Offices of Malkin & Associates P.L.L.C.* 2013 WL 525423 at *2 (D. Ariz. 2013). Entry of default judgment is discretionary. *See Aldabe v. Aldabe*, 616 F. 2d 1089, 1092 (9th Cir. 1980). Default judgment cannot be entered if defendants file a response, even if the responsive pleading is late. *Mitchell v. Brown & Williamson Tobacco Corp.*, 294 F.3d 1309, 1317 (11th Cir. 2002).

The entry of default judgment is a drastic step that a Court should decline to take if defendants show intent to defend. *See generally, Wilson v. Moore & Associates, Inc.*, 564 F.2d 366, 369 (9th Cir. 1977). A motion to dismiss is not technically a responsive pleading. *See generally* Fed. R. Civ. P. 6, 7. Nevertheless, by filing a motion to dismiss, defendants demonstrated that they intend to defend. Further, defendants filed another motion (Dkt. 19) and responses to plaintiff's motions (Dkt. 22, 33), which also evidences an intent to defend. The Court concludes that although defendants defaulted by failing to file an answer or file a dispositive motion within the 60 day proscribed period, it would be inappropriate in this case to grant a default judgment because defendants' failure to comply with the Court's order was temporary, defendants demonstrated their intent to defend, albeit late, and default judgment would deprive the defendants of the opportunity to defend the case on the merits. Therefore, the Court recommends denial of plaintiff's motion for entry of default judgment.

1 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have
2 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P.
3 6. Failure to file objections will result in a waiver of those objections for purposes of de novo
4 review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit
5 imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set the matter for consideration on April
6 24, 2015, as noted in the caption.

7 Dated this 2nd day of April, 2015.

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10 J. Richard Creatura
11 United States Magistrate Judge
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